BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KELLY ROBERTS	)	
Claimant	)	
	)	
VS.	)	
	)	
LAWRENCE DECORATING SERVICE	)	
Respondent	)	Docket No. 1,021,638
	)	
AND	)	
	)	
NATIONWIDE MUTUAL	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) request review of the May 11, 2005 preliminary hearing Order entered by Administrative Law Judge (ALJ) Brad E. Avery.

ISSUES

The ALJ found that claimant suffered an accidental injury arising out of and in the course of employment on October 31, 2004, and while claimant failed to give notice of his accident within 10 days, there was just cause for his delay. Accordingly, claimant was awarded temporary total disability benefits.

The respondent contends claimant did not suffer personal injury arising out of and in the scope of his employment. And that claimant failed to provide timely notice of his work-related injury. Respondent also contends that claimant's current condition is the "direct and natural result of the previous injury and not a wholly new and separate injury."[1] In either event, respondent maintains the ALJ's preliminary hearing Order should be reversed.

[1] Respondent's Brief at 2 (filed June 7, 2005).

Claimant contends that his low back complaints have intensified since he returned to work for respondent in 2002. He further contends that he suffered an acute aggravation in October 2004. He told his supervisor of this event on the same day, and when he was not offered treatment, he eventually sought medical assistance on his own in November 2004. Claimant continued to work regular duty until March 24, 2005, when his pain became so intense that he sought out treatment from a local emergency room. Finally, claimant asserts his present complaints are wholly independent of his earlier work-related injury for this respondent. Accordingly, claimant urges the Board to affirm the ALJ's preliminary hearing Order in all respects.

The issues the Board must address are as follows:

1. Whether claimant sustained personal injury by accident arising out of and in the course of his employment with respondent; and

2. Whether claimant provided proper notice as required by K.S.A. 44-520.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

In 2000 claimant sustained a compensable injury when he fell 12-15 feet from a roof. He shattered his left heel, ankle and suffered 2 compression fractures in his back. According to claimant, he received no treatment for his back following this injury. Claimant settled that claim in 2002 for a lump sum while retaining his right to future medical and thereafter, returned to work. According to claimant, he was unaware of any restrictions on his activities at the time he returned to respondent's employ. Nevertheless, he continued to have symptoms in his back that would come and go.

When he returned to respondent's employ in September 2002, claimant was performing his normal job duties which included climbing ladders, painting, running lifts and carrying materials. Claimant testified his back was becoming worse over time. In late October 2004 claimant indicated that he was lifting a 70-90 pound paint can when he felt a burning sensation in his back. Over the next day or so both legs began to hurt in addition to his lower back. Claimant maintains he told his employer, David Aikins, that night of his injury and even asked if the company had a doctor for him to see.

Mr. Aikins testified that while claimant certainly complained about his back hurting in October 2004, claimant never indicated it was connected to his work-related activities. However, Mr. Aikins understood claimant was making this request in connection with a

workers compensation claim.[2] Mr. Aikins further indicated that claimant did ask for the name of a physician, but Mr. Aikins says he simply referred claimant to a chiropractor.

In November 2004, claimant sought treatment from a chiropractor. The intake form which claimant apparently completed indicates that he sustained a back injury in 2000, but that the source of his present injury was "unknown".[3]

Claimant continued to work as much as he could, in spite of his pain complaints. This continued until March 24, 2005, when he sought treatment from an emergency room. He has not worked since that time.

Respondent sent claimant for an evaluation with Dr. John H. Gilbert on March 28, 2005. Dr. Gilbert advised claimant to avoid bending, twisting, and to lift only minimal amounts. Dr. Gilbert's records do not indicate that claimant disclosed any sort of acute accident in October 2004. Instead, his records relate claimant's ongoing complaints to the earlier 2000 accident. In any event, because respondent could not accommodate these restrictions, claimant was unable to return to work.

Claimant, at his lawyer's request, was also evaluated by Dr. Daniel Zimmerman. According to Dr. Zimmerman, claimant told him of an incident in October 2004 lifting paint cans. Up until that point, claimant told Dr. Zimmerman he had healed from his 2000 accident and suffered no difficulties from his compression fractures. Dr. Zimmerman suggested claimant have an MRI as well as an EMG to rule out a sensory radiculopathy.

The ALJ granted claimant's request for temporary total disability benefits commencing March 24, 2005. In doing so, he expressly concluded that claimant suffered an accidental injury on October 31, 2004. He also found that claimant did not give notice within 10 days of his accident, but that there was just cause for his delay. He also indicated that respondent's failure to post the requisite statutory notice regarding the filing of workers compensation claims further justified claimant's delay in reporting his claim.[4]

The Board has considered the parties' arguments and finds that, by the barest of margins, the claimant has met his evidentiary burden on the compensability issues. There is no dispute that the nature of claimant's job required him to routinely lift heavy paint cans. Claimant initially claimed the accident occurred in December 2004, but upon reflection, he testified that the acute injury occurred in late October 2004. This is consistent with what claimant told Dr. Zimmerman. Claimant did, however, also testify that his back continued to deteriorate from September 2002 to his last date of work.

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[2] P.H. Trans. at 65.

[3] *Id.*, Resp. Ex. B at 8.

[4] The ALJ's Order does not indicate when he believed notice was given.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[5] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[6]

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.[7]

Certainly there are some inconsistencies within claimant's testimony and the medical records, but at this juncture of the claim, the Board is persuaded that claimant has met his burden of proof. Like the ALJ, the Board finds that claimant sustained accidental injury on October 31, 2004 arising out of and in the course of his employment.

The Board is also persuaded that claimant provided proper notice of his injury. According to claimant, he told Mr. Aikin of his injury on the same day he was injured in October 2004. Mr. Aikins remembers claimant complaining about his back in late October and candidly admits that he understood this complaint and claimant's request for medical treatment was made in connection with a workers compensation claim.

K.S.A. 44-520 provides:

> **Notice of injury.** Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as

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[5] K.S.A. 44-501(a).

[6] K.S.A. 2004 Supp. 44-508(g).

[7] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212 (1991).

provided in this section, or (c) the employee was physically unable to give such notice.

The Board finds that timely notice was provided under these facts. While Mr. Aikins denies any express notification that claimant lifted a paint can that caused him injury, he concedes he understood claimant was requesting medical assistance in association with his claim. The purpose of notice is to give the respondent an opportunity to investigate the claimant's claim. Under these facts, claimant provided such a notice. Accordingly, the ALJ's preliminary hearing Order is affirmed in all respects.

As provided by the Workers Compensation Act, preliminary hearing findings are not final, but subject to modification upon a full hearing on the claim.[8]

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Brad E. Avery dated May 11, 2005, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of July, 2005.

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BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
Matthew S. Crowley, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

[8] K.S.A. 44-534a(a)(2).